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No. 92-1322

In the Supreme Court of the United States

OCTOBER TERM, 1992

JESUS FELIX-GUTIERREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, who helped the kidnapper and murderer of an American agent to avoid prosecution in this country's courts, may be prosecuted as an accessory after the fact, even though petitioner's actions occurred entirely outside the United States.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1b-28b) is reported at 940 F.2d 1200.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1991. A petition for rehearing was denied on January 3, 1992 (Pet. App. A). The petition for a writ of certiorari was filed on April 2, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, peti-

tioner was convicted on one count of being an accessory after the fact to the kidnapping and murder of a Drug Enforcement Administration (DEA) agent, in violation of 18 U.S.C. 3. He was sentenced to ten years' imprisonment. The court of appeals affirmed (Pet. App. 1b-28b).[1]

1. In February 1985, Special Agent Enrique Camarena of the DEA and Alfredo Zavala, a pilot who was a confidential DEA informant, were kidnapped, tortured, and murdered in Mexico. A month later, their bodies were found in an open field near Zamora, Michoacan, Mexico. The government introduced evidence at trial showing that Rafael Caro-Quintero, an alleged drug kingpin in Mexico, played a central role in the torture and murders of Camarena and Zavala. Petitioner was charged with assisting Caro-Quintero in his effort to avoid capture by law enforcement authorities. Pet. App. 3b.

As an associate of the Caro-Quintero narcotics enterprise, petitioner was responsible for the importation of hundreds of tons of marijuana into the United States from Mexico. He also assisted in the importation of cocaine into Mexico and the United

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[1] Petitioner was tried jointly with Rene Verdugo-Urquidez, who was charged with the kidnapping and felony murder of the DEA agent, conspiracy, and commission of violent crimes in aid of racketeering, in violation of 18 U.S.C. 1201(a)(5), 1111, 1114, and 371, and 18 U.S.C. 1952B (Supp. V 1987). The court of appeals reversed Verdugo's convictions. *United States* v. *Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991). The government filed a petition for a writ of certiorari, and this Court granted the petition, vacated the judgment, and remanded for reconsideration in light of *United States* v. *Alvarez-Machain*, 112 S. Ct. 2188 (1992). 112 S. Ct. 2986 (1992). Verdugo's appeal is pending in the court of appeals.

States from Colombia and Costa Rica. Pet. App. 3b-4b. In 1983 and 1984, petitioner directed the distribution by one individual of between one and five kilograms of cocaine on 30 or 40 occasions. Those drugs were sold for a total of $4.8 million. Gov't C.A. Br. 12-13.

On February 9, 1985, two days after Agent Camarena's disappearance, Caro-Quintero fled Mexico on a Falcon jet after an armed confrontation at the airport between Caro-Quintero's men and a group of Mexican law enforcement officials and DEA agents. Caro-Quintero flew to Costa Rica; petitioner arrived in that country the same day, traveling from Panama. Petitioner thereafter traveled under aliases between Panama, Costa Rica, and the United States. During March 1985, while in Costa Rica, petitioner helped Caro-Quintero buy a red Toyota. He was also seen at Caro-Quintero's residence in San Jose. Petitioner told a business associate that Caro-Quintero could not meet with him at the time, because they were people with few friends. Pet. App. 4b; Gov't C.A. Br. 13-14.

Petitioner told Arturo de la Torre, who often transported narcotics for him, that he and Inez Calderon had hired a pilot to take Caro-Quintero from Mexico to Costa Rica; he also said that the "heat was on" Caro-Quintero because of Camarena's kidnapping. Pet. App. 4b; Gov't C.A. Br. 14-15. On March 23, 1985, petitioner left Costa Rica fearing that Caro-Quintero's flashy style—wearing gold jewelry and driving expensive cars—would lead to his arrest. *Ibid.*

On April 4, 1985, Caro-Quintero was arrested. Afterwards, petitioner returned to Los Angeles. Al-

though petitioner had a home in Los Angeles, he stayed at a hotel in Monterey Park in a room registered to someone else. On April 9, 1985, while de la Torre was visiting petitioner at the hotel, they watched a newscast that reported petitioner's suspected involvement in the flight of Caro-Quintero from Mexico to Costa Rica. The news report mentioned petitioner's alias and his nickname, "Cachas." Petitioner told de la Torre that he never thought Caro-Quintero would "finger him." He and de la Torre left the hotel immediately, and they drove to Reno, Nevada, that night. Pet. App. 5b; Gov't C.A. Br. 15-16.

While in Nevada, petitioner had a tattoo removed from his shoulder; the tattoo included the name "Cachas." He returned to Los Angeles, where he had the stitches removed from his shoulder. Later, petitioner had plastic surgery on his face. Pet. App. 5b; Gov't C.A. Br. 16.

On December 24, 1986, petitioner was arrested in Whittier, California. At the time of his arrest, petitioner possessed false identification. He denied knowing Caro-Quintero, denied knowing anyone named Cachas, and terminated the interview when asked if he was Cachas. Pet. App. 5b; Gov't C.A. Br. 17.

2. At trial, petitioner filed a motion for judgment of acquittal, challenging the district court's jurisdiction to prosecute him. The district court denied the motion. Gov't C.A. Br. 18.

On appeal, petitioner again argued that the district court lacked subject matter jurisdiction to try him for crimes that occurred entirely outside the United States. The court of appeals rejected that

claim. First, the court of appeals found that, although 18 U.S.C. 3 does not expressly provide for extraterritorial application, the congressional intent to provide for extraterritorial jurisdiction may be inferred from the nature of the offense.[2] Pet. App. 6b-7b, citing *United States* v. *Bowman*, 260 U.S. 94, 98 (1922), and *United States* v. *Thomas*, 893 F.2d 1066, 1068 (9th Cir.), cert. denied, 498 U.S. 826 (1990).

The court of appeals concluded that the crime of accessory after the fact should be given extraterritorial effect to the same extent as the underlying offense. The court stated that it had inferred extraterritorial application of conspiracy statutes on the basis of the jurisdiction of the underlying substantive statutes, and it found no reason to apply a different rule in cases involving the offense of accessory after the fact. In this case, the court believed it clear that Congress intended extraterritorial application of the statutes that prohibit the kidnapping and murder of DEA agents. Pet. App. 7b-10b.

Finally, the court of appeals considered whether extending the application of this statute beyond the United States would violate international law. The court concluded that giving extraterritorial effect to the accessory-after-the-fact statute in this case is consistent with international law principles, because petitioner's actions "created a significant detrimental effect in the United States," because they injured the

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[2] 18 U.S.C. 3 states: "Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial, or punishment, is an accessory after the fact."

national interest of the United States by hindering the apprehension of Caro-Quintero, and because the victim of the underlying crime was a United States citizen. Pet. App. 11b-12b.

ARGUMENT

Petitioner renews his claim (Pet. 5-20) that the district court lacked subject matter jurisdiction over his offense of being an accessory after the fact, because petitioner's actions took place abroad and related to a crime committed abroad. That claim is incorrect, raises no conflict with any other case, and does not merit this Court's review.

1. Petitioner contends that the district court's exercise of jurisdiction in this case departs from the traditional principle of criminal law that accessories after the fact should be treated differently from conspirators and principals in the substantive offense. In rejecting that contention, the court of appeals properly relied on the analysis prescribed by *United States* v. *Bowman*, 260 U.S. 94, 97-98 (1922). As the Court stated in *Bowman*, the general rule against extraterritoriality "should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated * * *." *Id.* at 98. As to such statutes, the Court explained, an intent to extend their application beyond the boundaries of the United States could be "inferred from the nature of the offense." *Ibid.*

Applying those principles, the court of appeals began by examining whether the underlying crime for which petitioner was charged as an accessory

after the fact is subject to extraterritorial application. Pet. App. 7b-8b. The court had no doubt "that Congress intended to apply statutes proscribing the kidnapping and murder of DEA agents extraterritorially," *id.* at 8b, as the government's interest in deterring and punishing those who commit crimes against its agents is not limited to crimes committed within the territory of the United States. The very nature of those statutes supports an inference of congressional intent to extend jurisdiction beyond the boundaries of the United States. See *United States* v. *Layton*, 855 F.2d 1388, 1395-1396 (9th Cir. 1988) (extraterritorial jurisdiction over killing of a member of Congress), cert. denied, 489 U.S. 1046 (1989); *United States* v. *Benitez*, 741 F.2d 1312, 1317 (11th Cir. 1984) ("assault and attempted murder of DEA agents is exactly the type of crime that Congress must have intended to apply extraterritorially"), cert. denied, 471 U.S. 1137 (1985).

Having found that the underlying crime applies extraterritorially, the court of appeals then concluded that the crime of accessory after the fact should have the same jurisdictional scope as the crime on which it depends. The court reasoned that "[l]imiting jurisdiction to the territorial bounds of the United States would greatly curtail the scope and usefulness of the accessory after the fact statute in cases in which extraterritorial crimes occur." Pet. App. 9b. As the court noted, several cases have relied on the same analysis in determining the jurisdictional coverage of conspiracy statutes. *Id.* at 9b-10b, citing *Chua Han Mow* v. *United States*, 730 F.2d 1308, 1311 (9th Cir. 1984), cert. denied, 470 U.S. 1031 (1985); *United States* v. *Cotten*, 471 F.2d 744, 750 (9th Cir.),

cert. denied, 411 U.S. 936 (1973); *Brulay* v. *United States*, 383 F.2d 345, 350 (9th Cir.), cert. denied, 389 U.S. 986 (1967).

Petitioner does not dispute the court of appeals' conclusion that the underlying crime applies extraterritorially. He contends, however, that the court of appeals incorrectly gave the same treatment to the crime of accessory after the fact. He relies on the notion that the criminal law traditionally has drawn a distinction between conspirators, principals in the first and second degrees, and accessories before the fact, on the one hand, and accessories after the fact, on the other. While the former group are often treated as having the same degree of criminal responsibility, accessories after the fact are regarded as being guilty of a lesser offense, akin to obstruction of justice. Pet. 11-14.

The purported distinction between principals and accessories after the fact is beside the point with respect to the jurisdictional issue in this case. An accessory after the fact is treated differently from a principal with respect to the applicable punishment; whether the offense of accessory after the fact should be given extraterritorial application is an entirely different question. While the offense may be less serious,[3] the government still has an interest in punishing those who assist violators in avoiding prosecution. It therefore makes sense, for jurisdictional purposes, to give the accessory statute parallel coverage to that of the underlying offense that was assisted. As the court of appeals observed, a different rule would

[3] 18 U.S.C. 3 provides that an accessory after the fact is subject to one-half the maximum term of imprisonment prescribed for the principal.

greatly hinder the usefulness of the accessory after the fact statute in cases of extraterritorial crimes. Pet. App. 9b.

2. Petitioner further argues that the court of appeals' decision is inconsistent with established principles of international law. He contends that the court of appeals was incorrect in its conclusion that the exercise of jurisdiction in this case satisfied at least three of the permissible reasons under international law for a nation to extend its jurisdiction beyond its borders. That contention is without merit. The court of appeals was plainly correct in its conclusion that petitioner's actions in helping Caro-Quintero avoid apprehension for the murder of a DEA agent had a "significant detrimental effect in the United States," thus satisfying the territorial theory of extraterritorial jurisdiction. Pet. App. 12b.

Petitioner's actions also clearly fit within the protective and passive personality theories of extraterritorial jurisdiction. Assisting one responsible for the murder of a United States law enforcement official surely has a "potentially adverse effect upon the security or governmental functions" of the United States, *United States* v. *Benitez*, 741 F.2d at 1316, and the fact that the victim was a United States citizen and government agent puts the case squarely within the passive personality theory, *ibid.*; Pet. App. 12b. Petitioner's attempt to characterize his actions as affecting only the justice system of Mexico ignores the basic point that the underlying crime was one over which the United States could properly exercise jurisdiction; his actions affected the ability of the United States to prosecute all the perpetrators of that crime.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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